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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

~~No. 1411~~ 1209

UNION PETROLEUM CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

HUGH Q. BUCK
AUSTIN C. WILSON
RICHARD L. McGRAW
THOMAS J. BROBBY
Bank of the Southwest Bldg.
Houston, Texas 77002
Attorneys for Petitioner

Of Counsel:

FULBRIGHT, CROOKER, FREEMAN,
BATES & JAWORSKI

May 31, 1967

FIDELITY PRINTING COMPANY, INC., HOUSTON

INDEX

	Page
Citation to opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Reasons for granting the writ	5
Conclusion	13
Appendix A: Statute involved — 49 U.S.C. § 41(1)	1a
Appendix B: Opinion and Judgment below	3a
Appendix C: Conflicting Supreme Court Opinion	13a
Appendix D: Pertinent pages from the Transit Tariff	22a

CITATIONS

Armour Packing Company v. *United States*, 209 U.S. 56 (1908)	7
Grand Rapids & I. Ry. Co. v. *United States*, 212 Fed. 577 (6th Cir. 1914)	10
Lehigh Coal & Navigation Company v. *United States*, 250 U.S. 556 (1919)	5
Nichols and Cox Lumber Co. v. *United States*, 212 Fed. 588 (6th Cir. 1914)	9
Powell v. *United States*, 112 F.2d 764 (4th Cir. 1940)	10
People v. Hernandez, 61 Cal. 2d 529, 393 P.2d 673 (1964)	11
People v. Ratz, 115 Cal. 132, 46 Pac. 915 (1896)	11
Standard Oil Company of Indiana v. *United States*, 164 Fed. 376 (7th Cir. 1908)	5
United States v. *Altman*, 8 F. Supp. 880 (W.D.N.Y. 1934)	10
United States v. *Satuloff*, 79 F.2d 846 (2nd Cir. 1935)	10

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on April 10, 1967.

OPINION BELOW

There is no opinion of the District Court. The judgment of the Court of Appeals was entered on April 10, 1967 (10th Cir. R. 4). Its opinion, not yet reported, appears, *infra,* as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered April 10, 1967 (10th Cir. R. 4). A petition for rehearing, timely filed, was denied on May 1, 1967 (10th Cir. R. 6). The juris-

diction of this court is invoked under 28 U.S.C. §1254(1) and Rule 22(2):

QUESTIONS PRESENTED

1. Are culpability, *mens rea* or scienter material issues in a criminal prosecution for paying less for freight charges than that due?

2. Is it a criminal act for a person to pay less freight to a railroad than the amount due under the applicable tariff if the person computed and paid the correct amount under a different tariff which he reasonably and honestly believed was applicable?

STATEMENT

This is a criminal prosecution under the Elkins Act. While no individuals were prosecuted they could have been (49 U.S.C. § 41(1), App. A). Therefore, the new fundamentals of criminal law announced by the court below and involved in this Petition would be as equally applicable to an individual sentenced to two years imprisonment as to a corporation upon whom substantial fines have been imposed. This prosecution was commenced by an information (R. 1) filed by the United States against Petitioner in the United States District Court for the Eastern District of Oklahoma under the Elkins Act. The information contains 26 counts covering 26 separate shipments by railroad of propane, a liquefied petroleum gas (LPG).* The substance of each count was that Petitioner had solicited, accepted and received from the railroad a freight rate

* Liquefied petroleum gas: a compressed gas consisting of flammable, light hydrocarbons (as propane and butane) obtained esp. as a by-product in the refining of petroleum or the manufacture of natural gasoline and used chiefly as a domestic and industrial fuel, as a motor fuel, and as a raw material for chemical synthesis (as of synthetic rubber)—abbr. LPG. Webster's Third New International Dictionary (1964).

concession by the "device of falsely representing" to the railroad that freight charges due on the shipment were to be calculated in accordance with the Transit Tariff described below. Following a non-jury trial, Petitioner was found guilty and fined $1,000 on each count. As noted above, Petitioner's timely appeal to the United States Court of Appeals for the Tenth Circuit was unsuccessful and the conviction was upheld.

The facts concerning each shipment are substantially identical and have been stipulated. Each shipment was of railroad tank cars of propane obtained by Petitioner from the refinery of Sunray DX Oil Company at Sunray, Oklahoma, and shipped by rail to a point in the State of Missouri where it was delivered to a customer of Petitioner during late 1962 and early 1963. This customer distributed propane at retail to its customers for use in gas-burning appliances. It has been stipulated that there are two railroad freight rate tariffs which could be applicable to these shipments. The government contends that the amount of freight which should have been paid on each shipment should be calculated in accordance with a "local" tariff. The Petitioner contends that the amount due and paid the railroad for each shipment was properly calculated in accordance with the terms of the Transit Tariff described below. If the Transit Tariff used by Petitioner in calculating the amount paid to the railroad is not applicable, then less freight was paid to the railroad (mistakenly or not) than was due under the other possibly applicable tariff—the local tariff.

The Transit Tariff which Petitioner contended was applicable to determine freight rates on the shipments described in the information is the Southwestern Lines General Transit Rules Tariff. Pertinent provisions of this tariff are annexed hereto as Appendix D photographically reproduced — in the exact form the tariff pages are made

available to shippers such as Petitioner (except for some underscoring which was done for the benefit of the courts below).

As appears from the few pages of the Transit Tariff that are annexed hereto as Appendix D, the Transit Tariff is several hundred pages long, and covers all variety of commodities ranging from concrete molds to glass chimneys. Its incredible complexity can only be appreciated by examination of a page or two of its antiquated symbols, confusing cross-references and complex tables. For example, the "transit charge" is found in Part 1 of item 2658 (which appears in the middle of page 259 of the Transit Tariff — reproduced photographically in Appendix D) in this form:

Part 1— Transit Charge

The transit charge shall be { N16 @ 4½ / N16 @ 4½ } cents per hundred lbs on the outbound weight of the transit portion, which shall be in addition to the through rate.

The provisions of the Transit Tariff involved had not been the subject of judicial decision prior to this case. Several experts in freight rate tariff matters testified at the trial as to their opinion as to the applicability of the Transit Tariff to the shipments in question.

At the trial the tariff-publishing representative of the railroad vacillated and equivocated in his testimony, and then finally admitted that he did not know whether or not the Transit Tariff permitted Petitioner to use transit-computed rates or not (R. 116-121).

Every expert witness from the liquefied petroleum gas industry that had an opinion as to whether or not the Transit Tariff was applicable to Petitioner in the situations described in the information testified that transit was available to Petitioner (R. 89, 95, 123-124, 130-132).

The only witness testifying unequivocally that the Transit Tariff was not available to Petitioner was the representative of the Interstate Commerce Commission—the prosecuting witness, if you please. He took the position that transit was not available because the LPG shipped out of the transit station by Petitioner was of a different molecular structure than that shipped in. This, of course, was testimony directly contrary to that of the disinterested expert witnesses.*

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in direct conflict with a decision of this Court, *Lehigh Coal & Navigation Company* v. *United States*, 250 U.S. 556 (Appendix C, *infra*), and with a decision of another Court of Appeals. *Standard Oil Company of Indiana* v. *United States*, 164 Fed. 376 (7th Cir. 1908), cert. denied 212 U.S. 579 (1909).

2. The Court of Appeals' decision is erroneous because that court thought insignificant Congress' very obvious addition of the word "knowingly" as a modifier of all of the elements of an Elkins Act violation.

3. A conviction of a statutory crime in the absence of proof of *mens rea*, a guilty mind, is contrary to present-day concepts of criminality.

4. Shippers need to know if their honest mistakes are crimes.

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* The witness from the Interstate Commerce Commission would interpret the Transit Tariff as allowing transit-computed rates to LPG shipped in and out only if the LPG is put into dead storage or, in any event, if its molecular or chemical composition remains unchanged. He reached this conclusion despite the wording of the tariff (Item 2648, Appendix D.) that the scope of permissible processing at the transit station "includes also the following additional privileges at the transit station either prior or subsequent to placing in storage: Mixing, blending, fractionating (separating), purification, dehydrating and/or adding malodorant agent."

1 and 2. Discussion of the Conflicts.

It is apparent that the trial court was convinced that Petitioner made no attempt at deception, as evidenced by the remarks of the court and the imposition of the minimum fine of $26,000. (R. 144, 167). The maximum fine which could have been imposed was over $500,000. Yet the court concluded as a matter of law that "intent doesn't have a thing on earth to do with it," that conviction of Petitioner was "just mandatory" and that the court did not "have any alternative" (R. 167).

The Court of Appeals summarily dismissed Petitioner's contentions, which were based on this Honorable Court's holding in *Lehigh Coal & Navigation Company* v. *United States,* 250 U.S. 556, that since the word "knowingly" was inserted into the Act by amendment in 1906 an honest belief that the right rate has been paid is a defense to a prosecution under the Elkins Act.

The Courts below both erred in concluding that intent is immaterial in a criminal prosecution under the Elkins Act under a decision of this Court.

In a criminal prosecution of a shipper under the Elkins Act for knowingly accepting transportation at less than the duly established rate by receiving a privilege that was referred to in the tariff, but was not sufficiently spelled out in detail therein, this Court has held that it is a valid defense that the concession was received under the honest belief that it was lawfully established by the tariff, and under the honest belief that, in receiving it, the shipper was not disregarding what it believed to be the provisions of the tariff, but was complying therewith. *Lehigh Coal & Navigation Company* v. *United States,* 250 U.S. 556 (1919);

see also *Standard Oil Co. of Indiana* v. *United States,* 164 Fed. 376 (7th Cir. 1908), cert. denied 212 U.S. 579.

In the *Lehigh* case the shipper was prosecuted under the Elkins Act for receiving a privilege from the carrier which was referred to in the carrier's published tariff but was not specified in detail therein. That shipper was convicted in the District Court and appealed on the grounds that (1) it had interpreted the tariff correctly, or (2) if not, it should "be acquitted on proof that it accepted the concessions in the honest belief that it was not disregarding but was in truth complying with the lawful provisions of the published tariffs." *Lehigh Coal & Navigation Company* v. *United States,* 266 Fed. 457 (3rd Cir. 1920). The Court of Appeals certified the question raised by this second contention to the Supreme Court, and the Supreme Court answered in favor of the defendant-shipper. The Court of Appeals then held that the shipper had interpreted the tariff incorrectly and had received a concession, but reversed the conviction because of lack of culpability.

The court below relies on the earlier decision in *Armour Packing Company* v. *United States,* 209 U.S. 56 (1908), to support its contention that honest misinterpretation of a tariff is no defense. The Government's reliance on this case is misplaced, since the Supreme Court in the *Lehigh* case expressly limited the scope of the *Armour* case. In distinguishing the *Armour* case, the Court in the *Lehigh* case emphasized that the shipper in the *Armour* case did not comply with what it believed to be the proper tariff but instead completely ignored the tariff and acted in reliance upon a private contract.

In the case at bar, as in the *Lehigh* case, the shipper attempted to comply with the tariff which it honestly

believed to be applicable. Such belief was based upon a reasonable interpretation of the literal terms of the tariff and the decisions of the Interstate Commerce Commission and the Federal courts which, as presented in brief and argument to the court below, provide legal authority for each step of Petitioner's computation of rates in accordance with the Transit Tariff.

It is also significant that in the *Armour* case the offense was committed at a time when the word "knowingly" did not appear in the Elkins Act. The pertinent language of the Elkins Act, 32 Stat. 847 (1903), at that time provided as follows:

> "Every person or corporation who shall offer, grant or give or solicit, accept or receive any such rebate, concession or discrimination shall be deemed guilty of a misdemeanor. . . ."

However, the alleged violation in the *Lehigh* case occurred after the word "knowingly" was added to the Elkins Act by the Hepburn Act, 34 Stat. at L. 587 (1906). The Hepburn Act amended the pertinent language of the Elkins Act to read as follows:

> "Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor. . . ."

Further, the issue in the *Lehigh* case and this case was expressly reserved from decision in the *Armour* case. The Court in the *Armour* case reserved judgment on this issue:

> "Whether shippers who pay a rate under the honest belief that it is the lawfully established rate, when in fact it is not, are liable under the statute because of a duty resting on them to inform themselves as to the existence of the elements essential to establish a rate as required by law, is a question not decided, because not arising on this record."

This unresolved question was first presented and decided by the Seventh Circuit in favor of the shipper, and certiorari was denied by the Supreme Court just one year after its decision in the *Armour* case. *Standard Oil Company of Indiana* v. *United States,* 164 Fed. 376 (7th Cir. 1908), cert. denied 212 U.S. 579 (1909). The Court of Appeals quoted the question not decided by the Supreme Court in the *Armour* case as being the precise question involved in the *Standard Oil* case. The court reviewed the purpose for the Elkins Act and then concluded as follows:

> "But is the ordinary shipper, under any reasonable view of the situation to which the law relates, thus bound — bound at his peril, under this law intended to promote commerce, to cipher out, before he can safely put anything that he has into commerce, all the confusing papers and figures that generally make up a tariff sheet? Plainly not, it seems to us."

Recognizing that tariffs by their very nature are confusing, complicated and difficult to interpret, the Court held that a shipper is not guilty under the Elkins Act of having received a rate less than the lawfully published rate if he does not know that the rate received is less than the published rate, thereby not consciously ignoring the tariff.

The Government relied heavily below on *Nichols and Cox Lumber Co.* v. *United States,* 212 Fed. 588 (6th Cir. 1914)

(and its companion case, *Grand Rapids & I. Ry. Co.* v. *United States,* 212 Fed. 577 (6th Cir. 1914)), which, if it correctly states the law applicable to the instant case, would refute Petitioner's arguments. However, the *Nichols* case was decided several years prior to the Supreme Court's decision in the *Lehigh* case. The holding in the *Nichols* case is based on the Supreme Court's decision in the *Armour* case and is not surprising in view of the precedents then available to the Court. As the Third Circuit noted in the *Lehigh* case after the Supreme Court had answered the certified question in favor of the shipper, the Court's decision in favor of the shipper on the issue of good faith as a defense was against the trend of the decisions at that time.

Thus, it is clear that the most recent and authoritative pronouncement of this Court (and the only one since the word "knowingly" has been in the statute) establishes that an honest and reasonable misinterpretation of a tariff is a valid defense to an Elkins Act prosecution, and the *Armour* case and the *Nichols* case (and other cases which rely on them as authority) are out of date and not pertinent (and perhaps overruled) on the question of good faith.

Petitioner recognizes that several courts have erroneously cited and relied on the *Armour* case in holding that good faith misinterpretation of a tariff is no defense to a criminal prosecution under the Elkins Act. See, *e.g., United States* v. *Satuloff Bros.,* 79 F.2d 846 (2nd Cir. 1935); *United States* v. *Altman,* 8 F. Supp. 880 (W.D.N.Y. 1934); *Powell* v. *United States,* 112 F.2d 764 (4th Cir. 1940). These courts were apparently not aware of the limitation placed upon the *Armour* case by the Supreme Court in *Lehigh,* since the *Lehigh* case was not cited in the opinions.

The Supreme Court has never overruled or questioned its decision in the *Lehigh* case. Therefore, despite the

apparent oversight of several courts which has resulted in the perpetuation of an erroneous view of the law in this respect, the holding of the Supreme Court of the United States in the *Lehigh* case that good faith misinterpretation of a tariff is a valid defense in a criminal prosecution under the Elkins Act still stands.

3 and 4. Discussion of the Lack of Criminality Involved.

There are few neat analogies to the thrust of the opinion of the court below that culpability is immaterial. There are perhaps more cases discussing culpability as an element of criminality in the area of the crime of statutory rape than in any other. There has been recent and thoughtful treatment of the subject by the Supreme Court of California in *People* v. *Hernandez,* 61 Cal. 2d 529, 39 Cal. Rptr. 361, 393 P.2d 673 (1964). In this case the California Supreme Court overruled its ancient decision in *People* v. *Ratz,* 115 Cal. 132, 46 Pac. 915 (1896) (a precedent of nearly three-quarters of a century standing) on the question of whether or not a reasonable, good faith belief that the girl was over the age of consent is a defense to a charge of statutory rape. In a well-reasoned opinion, the court in the *Hernandez* case held, quite simply and directly, that it was contrary to modern but basic concepts of criminal jurisprudence to convict one of a statutory crime in the absence of culpability.

The simple, direct statement of the California court cannot be improved upon:

> "The primordial concept of *mens rea,* a guilty mind, expresses the principle that it is not conduct alone, but conduct accompanied by certain specific mental states which concerns, or should concern the law . . .

> [T]he case books are filled to overflowing with the courts' struggles to determine just what state of mind should be considered relevant in particular contexts. In numerous instances culpability has been completely eliminated as a necessary element of criminal conduct. . . . More recently, however, this court has moved away from the imposition of criminal sanctions in the absence of culpability where the governing statute, by implication or otherwise, expresses no legislative intent or policy to be served by imposing strict liability."

In the case at bar, Petitioner's plea of lack of culpability was dismissed with a restated "ignorance of the law is no excuse". Petitioner has no quarrel with that general proposition. Petitioner then knew and now knows the law. It was a crime if Petitioner *knowingly* received a rebate, concession or discrimination by a device. The question left unanswered is, "If Petitioner did not *know* it was receiving a concession by a device, did it nevertheless commit the crime?"

Traffic management has usually been regarded as a reasonably steady, risk-free occupation. However, if the decision of the court below is allowed to stand, every traffic manager or other shipper of freight is put in peril of very substantial fines and long jail terms if he reasonably and innocently misinterprets a complicated tariff such as the one involved in this case.

Despite diligent search, Petitioner has been unable to unearth another single instance in criminal jurisprudence in which an honest, reasonable misinterpretation of a complicated document constitutes a crime.

A traffic manager needs to know if his mistakes are crimes.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

HUGH Q. BUCK
AUSTIN C. WILSON
RICHARD L. McGRAW
THOMAS J. BROBBY

Counsel for Petitioner

Of Counsel:

FULBRIGHT, CROOKER, FREEMAN,
BATES & JAWORSKI

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